

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CIVIL ACTION NUMBER:

GRILLO'S PICKLES, INC.

2:23-cv-00011

Plaintiff,

CONFERENCE

v.

PATRIOT PICKLE INC., ET AL.

Defendants.

10 Martin Luther King Building & U.S. Courthouse
11 50 Walnut Street
11 Newark, New Jersey 07101
12 Wednesday, August 2, 2023
12 Commencing at 2 P.M.

B E F O R E:

THE HONORABLE MADELINE COX ARLEO,
UNITED STATES DISTRICT JUDGE

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Proceedings recorded stenographically.
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(PROCEEDINGS held in open court before

The Honorable MADELINE C. ARLEO,

United States District Judge, at 2:06 p.m.)

4 MR. MARINO: Good afternoon, Your Honor. Kevin
5 Marino, Marino, Tortorella, and Boyle for Grillo's Pickles.
6 With me is my partner John Boyle and also Cristina Crowley
7 from Quinn Emanuel.

8 THE COURT: Okay. Thank you.

9 MS. DEL MEDICO: Good afternoon, Your Honor.
10 Jennifer Del Medico from Jones Day. I'm here with my
11 colleagues Harold Gordon and Patrick Wright.

12 | THE COURT: Okay.

13 MR. BLUESTONE: Good afternoon, Your Honor.

14 Lawrence Bluestone from Genova Burns on behalf of Arkk Food
15 Company and Wahlburgers. With me is Michael Latiff from
16 McDonald Hopkins also admitted pro hac as are many over here.

17 | THE COURT: Okay. Thank you. Have a seat everyone.

I called you in for a status conference just to see where we are at. Thank you for the letters. I have read them. I went back and looked at some of the other filings.

21 And a couple of observations I'd like to talk to
22 everyone afterward privately if you want to about the
23 possibility of seeing where the parties are at in terms of
24 settlement and/or mediation.

25 Before me is a preliminary injunction hearing. And I

1 want to tell you what I read between the lines of both of
2 these cases. So I see there has been an application made by
3 Grillo's about a chemical contained in its competitor's
4 pickles, Patriot Pickle Company that does some packing.
5 Sodium benzoate I think is the chemical.

6 The pickles are advertised as all natural and are
7 sold at Whole Foods. It turns out they have this chemical
8 which is a preservative that would interfere with their
9 ability to advertise it as all natural.

10 Patriot Pickle responds and says, We have taken that
11 out. It was put in accidentally. It was in there. We have
12 taken it out.

13 We have tested our pickles. None of our pickles have
14 them. To the extent that pickles that are still on the shelf
15 might have had them, there is a short shelf life for pickles,
16 and they are already gone. And so the issue is moot.

17 And there is a separate issue whether they are GMO
18 certified by a third-party. What I can glean from the papers
19 it looks like there came a point after this lawsuit was filed
20 that, in fact, Patriot Pickles did obtain the GMO
21 certification.

22 That is not part of the PI application in any event.
23 I thought I would just put it out there what the case is
24 about.

25 So I look back at the order for PI that was submitted

1 to me. And here is what relief was sought: Preliminarily
2 enjoining defendants from making false and misleading
3 statements claiming that Wahlburgers Pickles contain no
4 preservatives, are all natural, and are fresh. And ordering
5 the defendant from including the name of the artificial
6 chemical preservative on the labels and describe it as a
7 chemical preservative.

8 So they seem like contrary reliefs. On the one hand
9 you can't advertise that it is all natural and also you have
10 to put the chemical on the label.

11 There also seems to be a factual dispute at least a
12 little bit about whether or not, in fact, the new pickles have
13 had this chemical removed. And that would be where I'd like
14 to begin.

15 I would like to begin by asking that of, first, I'd
16 like to ask Patriot to respond. I looked at Mr. McEntee's
17 certifications. There is three of them. It looks like
18 according to him, that the sodium benzoate has been taken out
19 of all of the pickles. Is that right?

20 MR. GORDON: Good afternoon, Your Honor.

21 Harold Gordon for Patriot Pickle.

22 That is correct. As Your Honor probably saw in the
23 papers, within something like 48 hours of the complaint
24 originally being filed in January of this year, Patriot Pickle
25 investigated the allegations. And got to the bottom of what

1 was an unintentional addition of sodium benzoate to certain of
2 the Wahlburgers Pickles. That has been taken out and they
3 have done regular testing through Certified Labs, which is an
4 establish lab nationally. Each of which show that there is no
5 sodium benzoate below the lowest detectable level in those
6 food product tests.

7 THE COURT: Okay. And what about the GMO
8 certification?

9 MR. GORDON: So there was two allegations essentially
10 as I recall it from the amended complaint. One was that
11 stating that a product is GMO free is somehow inherently
12 incorrect or unprovable, if you will. And, secondly, that the
13 GMO symbol that Wahlburgers used on its label bore a
14 resemblance to the Non GMO Project which is a third-party
15 certifying organization.

16 In July I believe just last month of this year
17 Patriot Pickle achieved Non GMO Project certification for each
18 of the Wahlburgers' products. Before that, as is authorized
19 under the Code of Federal Regulations, Patriot Pickle was
20 entitled to say that their product was GMO free because they
21 had confirmed that the growers of the cucumbers used for the
22 pickles and the other ingredients were indeed each GMO free,
23 which entitles you to say the product is GMO free on the
24 label.

25 THE COURT: Okay. Let me ask plaintiff's counsel.

1 Let's start first with sodium benzoate because that is what
2 prompted the lawsuit.

3 MR. MARINO: Yes, Your Honor.

4 THE COURT: So what happened? They are saying it is
5 taken out. McEntee has three affidavits. They all say we
6 took it out. Here are all our lab tests.

7 MR. MARINO: Right. They make that assertion. We
8 haven't verified that and have no way to verify it.

9 THE COURT: Okay. Here is the way to verify it, test
10 the pickles.

11 MR. MARINO: Correct.

12 THE COURT: That is the way to verify it.

13 This has been going on now for seven months. There
14 are probably 18 to 20 lab results. They tested them.

15 Have you done any recent testing since this action
16 has been filed?

17 MR. MARINO: To my knowledge we have not done recent
18 testing since the action was filed. No, Your Honor.

19 THE COURT: So, if we were to go forward with the
20 preliminary injunction hearing what would you do? It would be
21 your burden.

22 MR. MARINO: The first thing I would need to do is
23 have some discovery obviously, Your Honor. And that is what
24 we would asked you to grant us.

25 THE COURT: Okay. So let's -- you have discovery

1 ongoing with Judge Espinosa. Right?

2 MR. MARINO: Yes, Your Honor.

3 THE COURT: So what discovery have you taken in the
4 last six months? Have you asked for the results of the
5 pickles. The pickle results are all here. Right?

6 I will cut right through it. They have a report of
7 Certified Laboratories from Melville, New York that reports on
8 a regular basis test results that say there is no -- there is
9 a very small detectable level in sodium benzoate in the
10 pickles. They are dated. One is received on May of '23, June
11 of '23. They are all different dates.

12 So the first thing to do is to really talk to your
13 adversary and maybe follow-up and do your own independent
14 testing to confirm. Right?

15 MR. MARINO: That is what we'd like to do. Yes.

16 THE COURT: Then confirm, and then we know there is
17 no need for a preliminary hearing.

18 If I was to, hypothetically, have a PI hearing, I
19 would take all Mr. McEntee's certifications, which are
20 unopposed, and say there is no need to issue a PI because it
21 looks like there is no more sodium benzoate in the pickle, and
22 that would remove both prongs of the relief sought in the PI
23 hearing. Right?

24 MR. MARINO: I understand that, Your Honor, but we
25 haven't had the opportunity to verify, as you've indicated --

1 THE COURT: Okay.

2 MR. MARINO: -- and we'd want that opportunity
3 obviously --

4 THE COURT: Sure.

5 MR. MARINO: -- before a hearing.

6 THE COURT: Have you had any conversations with your
7 adversaries about the testing and what they've done and is it
8 in or out or other --

9 MR. MARINO: To my understanding, Your Honor, is that
10 there has been conversation between the principals, not
11 between counsel --

12 THE COURT: Okay.

13 MR. MARINO: -- but I certainly think it makes sense
14 to have those conversations between counsel --

15 THE COURT: I do too.

16 MR. MARINO: -- and also I, frankly, think it
17 probably makes sense, Your Honor indicated or averted early
18 onto to the possibility of mediation --

19 THE COURT: -- mediation.

20 I appreciate you raising that, Mr. Marino. This case
21 cries out for mediation. Unless the Patriot Pickle people are
22 giving me false affidavits, it looks like the sodium benzoate
23 has been removed. It is a preservative. It is gone. It is
24 out of the pickles.

25 If that is true, we have that piece. Then we have

1 the GMO piece. They are certified as GMO as of June or
2 July 2023. Their position is, even though we weren't
3 certified by this third-party certifier, we were entitled
4 under the federal law to call ourself GMO free because we
5 confirmed that the growers were all certified organic or
6 nongenetically modified.

7 So that would be a matter of sharing data to say,
8 Look, here are our sources. We had the right. Whether they
9 had the right to put the butterfly on the label is a different
10 story. But if they, in fact, were GMO free, they probably had
11 the right to advertise as GMO free. Right?

12 MR. MARINO: I think they have a big problem there
13 Your Honor, frankly, but --

14 THE COURT: Well, that's the second thing --

15 MR. MARINO: -- for the reason that you have
16 indicated it certainly makes sense --

17 THE COURT: -- right --

18 MR. MARINO: -- from our perspective to have a
19 conversation with them about it --

20 THE COURT: -- right --

21 MR. MARINO: -- to mediate with them about it, but I
22 will point out as we have in our letter this is about the
23 non GMOS. It's a little squirrely.

24 THE COURT: It is squirrely, but the point is they
25 have it now.

1 MR. MARINO: So they say.

2 THE COURT: So they say. So I take people at their
3 word when they say it because they are officers of the court
4 they have certified to me in a written submission that they
5 are now GMO certified. I take them always at their word until
6 they prove me otherwise. Okay.

7 What is the damages? Let's assume that, just for
8 argument's sake, that on the sodium benzoate there was a
9 discrete period of time, I think it was about two years maybe
10 less. What is the theory of damages? Because you are not a
11 consumer. You are not Whole Foods. You are a competitor?

12 MR. MARINO: That is right.

13 THE COURT: You are a bigger competitor than they
14 are. Right?

15 MR. MARINO: Yes.

16 THE COURT: Much bigger. So you are the big
17 competitor who has come to court to say, I want damages
18 because they somehow damaged our business by diluting the
19 brand.

20 MR. MARINO: I don't think there is any doubt that
21 they damaged our business, Your Honor. The liability is --

22 THE COURT: What is the theory? I struggle to
23 understand the theory of damages. Is it that they diluted our
24 brand and our sales dropped?

25 MR. MARINO: They are selling their pickles next to

1 our pickles. Our pickles are legitimately organic pickles.
2 Their pickles now they are telling us, they admit they were
3 not legitimately organic pickles.

4 They say it was a mistake. Sodium benzoate was
5 introduced. We know will that sodium benzoate is a
6 preservative.

7 We know it extends the shelf life of the pickles. We
8 also know that they are able to sell the pickles less
9 expensively than we are. As far as what the quantum of
10 damages is, that is another question. I think we need
11 discovery about --

12 THE COURT: -- what is the theory of damages? In
13 other words, there has to be a theory. Right?

14 MR. MARINO: Yes.

15 THE COURT: Is the theory just like statutory damages
16 for misrepresenting a product or is it a diminution in sales?
17 What is the theory of -- I'm trying to understand the --

18 MR. MARINO: I think I'm trying to sell pickles that
19 are legitimately organic non preservative pickles. I'm
20 selling them next door to a competitor that doesn't have
21 legitimate, by its own admission, does not have legitimate
22 organic preservative free pickles. And they are taking sales
23 away from me.

24 How much? Hard to say, right? We can find that out
25 through discovery. But I don't think the problem here is a

1 liability issue. I think the problem is how much are we
2 talking about.

3 THE COURT: So here is what I would think. You have
4 to go -- if you are before a jury, you have to explain what,
5 how much damages and why. So what I would expect is -- a
6 couple of things have been said here. Pickle sales, priced
7 differently. Right? So you would have to have during that
8 two year period did your sales depreciate, you know, go down
9 while theirs went up? Is there a --

10 MR. MARINO: -- you have to look at both. You have to
11 look at what our sales and their sales are to make that
12 determination.

13 THE COURT: And you also have to look at causation.
14 Right?

15 MR. MARINO: Correct.

16 THE COURT: Because there probably -- there is no
17 consumer complaints that I've seen. Right?

18 So if someone's -- did the pickle, did the pickle
19 prices go up since they became GMO certified and -- I know
20 everything went up, but proportionately did they go -- have
21 sales increased because of -- because the theory seems to be
22 they were selling their pickles more cheaply because they were
23 cutting corners and they were selling pickles that were not
24 all natural. Right?

25 MR. MARINO: Yeah.

1 THE COURT: So if the prices have stayed the same
2 since they took the sodium benzoate out of the pickles --

3 MR. MARINO: -- I don't want you to sell any
4 pickles --

5 THE COURT: No. No.

6 MR. MARINO: -- if I'm me, I don't want you to sell
7 any of the --

8 THE COURT: Please let me finish.

9 You need a framework for damages if there is going to
10 be a settlement. It can't just be you defrauded the public.
11 You sold pickles. Your pickles were not natural and ours
12 were. There has to be a methodology for damages in every
13 case, in every commercial case --

14 MR. MARINO: Completely --

15 THE COURT: -- I'm just trying to understand what the
16 methodology is. And so part of it is are people -- if you
17 were to go to trial on a case like this there have to be a lot
18 of experts that have to weigh in. Right?

19 One of them would have to be that what motivates
20 consumers. It would be consumer experts and marketing experts
21 to say people are motivated by price or they are not motivated
22 by price.

23 But it is really not about the consumer here. It is
24 about how you were damaged by them selling a product. Is it
25 that sales from both parties drop because people realize that

1 they were not all natural.

2 There has to be a damages theory. There could be
3 competitive theories, alternative theories, but what I -- and
4 the reason I'm pressing you so hard on this is because if you
5 are going to have a settlement, it has to be based on some
6 rational theory of damages. I'm not understanding that
7 theory.

8 MR. MARINO: I think I can be helpful when Your Honor
9 wants to hear that.

10 THE COURT: Sure tell me.

11 MR. MARINO: So we sell an organic product. Someone
12 who says they sell an organic product is competing unfairly
13 with us and they are by definition competing for the same
14 customer. If the customer who is in that section looking for
15 an organic product thinks it has a choice between Grillo's
16 Pickles and Patriot's Pickles, that is simply not true.

17 Why is it not true? Because during a certain period
18 of time these pickles that they were selling were not organic.
19 Yet by representing to the public that they were, by
20 definition, they are competing for my customer on an improper
21 basis. So they are taking customers away from me.

22 I think that is -- I'll say this to Your Honor,
23 getting to the quantum of damages, to me that is the issue,
24 but in terms of Your Honor's question of the theory of
25 damages, that's the theory of damages.

1 You can think about it in a wide variety of context
2 by analogy, if we are saying, we, Patriot Pickle are saying we
3 sell the same things that Grillo sells and we don't, then we
4 are unfairly competing for their customers.

5 So, I say, I'm going to put my automobile on the
6 market. My automobile say has a 400 horsepower engine. Turns
7 out you say the same thing, you have a 400 horsepower engine
8 too. Now we are both competing for the consumer of the
9 400 horsepower engine. Only we find out that through some
10 mistake you only have a 300 horsepower engine.

11 I don't think that it's that difficult to think of us
12 having a theory of damages. You came after my customer and
13 you got some of my customers because you told them you sold
14 the same thing I did, but you didn't.

15 So, I also take Your Honor's point, they are officers
16 of the court, they tell you the truth. Sodium benzoate isn't
17 there any more. It is gone. Okay.

18 Let's assume that is true. I like to trust and
19 verify. I trust them too. I'm sure they believe that is
20 right. I'm sure nobody is filing false affidavits before this
21 court, but I like to test it.

22 When it comes to theory of damages it is just not
23 enough to say, Oops, you know what, I wasn't really, I wasn't
24 really organic. And, by the way, neither was I really
25 certified by non GMO. I have it there by these -- you know,

1 the mark, the butterfly or two leaves. That is misleading.
2 And maybe it is intentionally, maybe it is not intentionally
3 misleading.

4 I just know this: If you are selling pickles that
5 have sodium benzoate in them, you ain't selling natural
6 pickles. Okay. So if you are taking my customers away that
7 way, that's why I got a lawsuit.

8 THE COURT: So here is the premise of your argument:
9 If you are taking my customers away.

10 MR. MARINO: Correct.

11 THE COURT: What I say to you is: If sales of
12 Grillo's have gone up throughout this period, or say the
13 consonant, as did Patriot's, then it is hard to make a
14 plausible argument that you are taking away my customers.

15 MR. MARINO: You are absolutely right.

16 THE COURT: That is number one.

17 Number two, there could be a lot of different reasons
18 why sales drop. That is why you have experts to look at it.
19 You look at causation.

20 The difference, the thing that makes this case to me
21 a little bit different than other consumer cases is that there
22 are no complaints. There are no consumer complaints that
23 anyone has shared with me in the limited amount of paper that
24 I've reviewed.

25 So, in other words, yes, they misrepresented. But it

1 is unlike a car, because you eat a pickle and it is gone.
2 There is probably not a taste difference and no one is saying
3 that to me anyway. So there is not -- it is hard to
4 understand from me what the diminution in quality has been or
5 the diminution in reputation for Grillo's if this has not
6 been, this has -- there are no customer complaints where
7 people stop buying these kind of pickles.

8 That is why I get back to if your theory is, They
9 were selling cheaper pickles because they didn't have this
10 preservative in them that ours did, I would imagine that a lot
11 of times when two companies or one company acts
12 anti-competitively or does something unlawful, that sales
13 drop. That you took away our customers.

14 That is why I began with that, because it is a, it is
15 a discrete period of time. And you need to say to them this
16 is what, you know, this is the data that we need from you, the
17 sales data to make a reasonable demand of what we think are
18 the damages.

19 Because I'm reading about settlement, it seems to me
20 now that we know that the sodium benzoate is, assuming that it
21 has been taken out of the pickles, assuming that they do have
22 the GMO free certification now, that we are talking about a
23 discrete period of time. And that should be the foundation
24 for a settlement conversation.

25 Otherwise, you are going to -- the only thing I know

1 for certain is one thing. These cases are extraordinarily
2 expensive to litigate. Because causation is a very
3 complicated issue.

4 And you have to have marketing surveys done. You
5 have to have economist come in.

6 You are looking at a two year period of time in the
7 middle of a global pandemic when sales are probably off for a
8 lot of people in a lot of places. And it is going to be -- I
9 will promise you one thing attorneys' fees will exceed damages
10 in a case like this with the kind of law firms running both
11 sides of this case. That is why I'm pushing you a little bit
12 to focus on what the damages are and to focus on -- because
13 that to me would be the framework for resolution.

14 MR. MARINO: I really do appreciate that, Your Honor,
15 completely appreciate it. And I think the court is absolutely
16 right. We are talking about -- assume arguendo that
17 everything that is being represented to the court is true.
18 Let's assume that's right.

19 We are talking about a discrete period of time, and
20 identifiable damages. Right? Shouldn't be hard. Sit down.
21 Here is what we made. Here is what we did.

22 I don't think it's a hard thing to do. I certainly
23 would advocate for doing.

24 I think it makes more sense then going forward and
25 having a hearing. I don't want to be in a situation where the

1 quantum of damages is outstripped by legal fees. Makes
2 absolutely no sense. That is not what we are trying to do
3 here.

4 There has been a good deal of confusion between these
5 two types of pickles. I think it sounds, almost sounds like a
6 little silly. Like, Oh, you are fighting about nothing it
7 sort of sounds like. Right? That is really not so.

8 The only thing that is important to me in the
9 interaction with Your Honor is that you understand we didn't
10 bring this action over something that we think is silly. We
11 feel that Wahlburgers is and was improperly competing with us
12 by misrepresenting the nature of its product.

13 When you are talking about no consumer complaints.
14 Well, you know, these pickles taste great to me. The good
15 news is they are organic. I get great tasting organic
16 pickles.

17 Well, it turns out mine aren't really great tasting
18 organic. They have a little salt in there, a little sodium
19 benzoate in there. Make them taste a little better. That's
20 what this is about.

21 What the numbers are, I'd like to get to the bottom
22 of. Last thing I want to do is waste --

23 THE COURT: I just wanted to -- one other point.

24 This is not a consumer case. This is not a case
25 brought by Whole Foods. It is brought by a competitor.

1 And a competitor's damages are the diminution of my
2 business. That is what you have to prove.

3 You just can't come to court to a jury and say, This
4 isn't fair. You have to say my product suffered because of
5 their product. That is where we get to the real numbers if we
6 are going to have a reasonable settlement.

7 What is the position on attorneys' fees? Are they
8 discretionary under the statute?

9 MR. MARINO: That's a good question.

10 THE COURT: I don't think they are automatic, if at
11 all. Does anyone know if there is any entitlement to
12 attorneys' fees for a prevailing party?

13 MR. GORDON: I don't know the answer to that,
14 Your Honor.

15 THE COURT: Okay. Something you should both look at.

16 I'm going to ask both sides to take a few minutes and
17 speak privately together. Talk out in the hallway. If you
18 think it would be beneficial to talk to me privately, that
19 would be helpful.

20 I'm not inclined to -- I'm inclined to -- I will let
21 you be heard, I don't want to waste a lot of anyone's time.
22 I'm inclined to dismiss this preliminary injunction hearing as
23 opposed to deny it or deny it without prejudice to renew it
24 after further testing is done. But I don't think we can go
25 forward with the hearing now in light of all of the

1 developments since it was filed.

2 I would like to have you consider mediation with a
3 good mediator. And maybe agree to exchange some preliminary
4 discovery so you can go to a mediator.

5 I know there was some discussion in the letters I
6 don't want to share on the record about some preliminary
7 observations. You can go back to Judge Espinosa. I can be
8 involved.

9 But I want you to talk about where you are for the
10 lawyers in terms of settlement demands. What documents if any
11 you need to move forward. Put discovery on hold and to the
12 extent you need discovery, have limited discovery to inform
13 the settlement conversation.

14 Why don't you take a few minutes out to speak. Let
15 us know when you need to speak with us and I'm happy to come
16 out or speak with every one privately.

17 MR. MARINO: Thank you very much, Your Honor.

18 MR. GORDON: Thank you very much, Your Honor.

19 (Recess at 2:31 p.m. to 3:13 p.m.)

20 THE COURT: So I spoke with both sides. I think it
21 makes sense to pursue mediation with Judge Wolfson. I will
22 send an order out for mediation.

23 One little point, whether you need any discovery to
24 have a meaningful mediation. I think it may be better to have
25 a phone call with her. See what she wants in advance of the

1 mediation. See if you can do it without any additional
2 discovery.

3 If you have one session with her and you realize you
4 need some sales data or other information, then you can put a
5 pause on it. Share that information and then come back again.

6 Because sales data and financial data, there is all
7 kind of, you know, it is just complicated. It is not that
8 easy to exchange. You are going to have to have
9 confidentiality orders and all of that stuff for a privately
10 held company.

11 I think it makes sense just to go to her and see if
12 you can pull it together. If you can't, you can move forward
13 with some minor discovery at her suggestion.

14 MR. MARINO: That is great, Your Honor. Will
15 Your Honor issue an order to that affect?

16 THE COURT: I will.

17 Thank you for coming in. Have a great day.

18 MR. MARINO: Thanks for having us.

19

20 (The proceedings are concluded at 3:15 p.m.)

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3 **FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE**
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7 **I, Laurie A. Engemann, CCR, CRCR, RPR, Official Court**
8 Reporter of the United States District Court for the District
9 of New Jersey, do hereby certify that the foregoing is a
10 correct transcript from the record of proceedings in the
11 above-entitled matter.

12
13
14 */S/ Laurie A. Engemann CCR, CRCR, RPR*

AUGUST 9, 2023

15 *Signature of Official Court Reporter*

Date

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